Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-168

STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC.,
Petitioner,

--and--

PATRICIA ROBERTS HARRIS, and
THE CITY OF NEW YORK,
Petitioners,

—v.—

ROLAND N. KARLEN,
ALVIN C. HUDGINS and CONTINUE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Strycker's Bay Neighborhood Council respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on December 14, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 590 F.2d 39. The opinion of the District Court for the Southern District of New York is reported at 445 F. Supp. 204. Previous opinions of the Court of Appeals and the District Court are reported at 523 F.2d 88 and 387 F.Supp. 1044 respectively. Petitioner is relying on the appendix submitted with the petition for certiorari on behalf of Patricia Roberts Harris, in which all four opinions will appear.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 14, 1978. A timely petition for rehearing with a suggestion for a rehearing in banc was denied on March 15, 1979. Mr. Justice Marshall has granted applications by petitioner to extend the time for filing this petition: the first, by order dated June 7, 1979, extending the time to and including July 13, 1979, and the second, by order dated July 5, 1979, extending the time to and including August 3, 1979 (A-1063 and A-1071, respectively). The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals preempted agency discretion and violated the standard of review under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), and the National Environmental Policy Act, 42 U.S.C. §§4331 et seq.

2. Whether Section 102(2)(E) of the National Environmental Policy Act, 42 U.S.C. §4332(2)(E), requires a federal agency to evaluate alternatives to a proposed action in the absence of an Environmental Impact Statement prepared pursuant to 42 U.S.C. §4332(2)(C).

3. Whether social and psychological factors, such as community opposition to public housing, are environmental factors within the scope of the National Environmental Policy Act, 42 U.S.C. §§4331 et seq.

STATUTES INVOLVED

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706, provides in relevant part:

> The reviewing court shall --
>
> * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions, found to be --

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...

Section 102(2) of the National Environmental Policy Act, 42 U.S.C. §4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall --
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,

> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;
>
> * * * *
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources...

STATEMENT OF THE CASE

This action was instituted in October, 1971 by the original plaintiff, Trinity Episcopal School Corporation, seeking to enjoin construction of a 160-unit public housing project on a certain site, designated "Site 30", in the West Side Urban Renewal Area in Manhattan. The jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343 and 2201. In April, 1972, the petitioner, Strycker's Bay Neighborhood Council, joined this action as an intervening defendant.*

The trial, which was concluded in May, 1974, was limited, by stipulation of counsel, to four issues, in all of which the District Court found in favor of petitioners. On appeal by the respondents, the Court of Appeals affirmed on all issues except as to the issue of whether the Special Environmental Clearance prepared by the Department of Housing and Urban Development (HUD) com-

*The present respondents, Karlen, Hudgins and the organization CONTINUE later intervened as plaintiffs; the original plaintiff, Trinity Episcopal School Corporation, was subsequently discontinued from the action.

plied with the National Environmental Policy Act (NEPA), 42 U.S.C. §§4331 et seq.

Under HUD guidelines then in effect,* a proposed public housing project of 100 or more units required the preparation of a "Special Environmental Clearance." As explained by the District Court:

> HUD Circular 1390.1 established certain "thresholds" that are used to isolate those projects that may be major federal actions significantly affecting the quality of the human environment. A project passing the first threshold is then given special environmental consideration and study. This means that the project must be thoroughly investigated, and the HUD office involved must either file a "negative statement" indicating that approval of the project application is consistent with established

*HUD Handbook 1390.1 on environmental clearance procedures was originally issued in the Federal Register, 38 F.R. 19182 (July 18, 1973). The procedures were subsequently amended at 38 F.R. 38922 (November 4, 1974), 41 F.R. 23978 (June 11, 1976), 42 F.R. 13208 (March 9, 1977), 42 F.R. 37605 (July 22, 1977), 43 F.R. 797 (January 4, 1978), and 44 F.R. 12856 (March 8, 1979).

> HUD policy and standards and that the project would have no significant adverse effect on the environment or, if unresolved environmental issues or concerns remain, the HUD office must draft and circulate a detailed environmental impact statement.
>
> Appendix at 122a-123a.*

HUD determined that the 160 unit project on Site 30 would not significantly affect the environment. The agency did not, therefore, prepare and file an Environmental Impact Statement pursuant to NEPA Section 102(2)(C), 42 U.S.C. §4332(2)(C). Its environmental review was therefore completed with the preparation of the Special Clearance. The respondents' attack on the adequacy of HUD's compliance with NEPA was primarily their contention that HUD did not address alleged psychological and social impacts on the environment, such as community attitudes and fears and whether the proposed project would cause "tipping" by driving middle-class people out of the area. In addition, respondents argued that HUD was required to evaluate alternatives to the project.

*Citations are to the Appendix accompanying the petition on behalf of Patricia Roberts Harris.

Both HUD and the District Court rejected the respondents' contention that social and psychological factors are a proper subject of inquiry in a NEPA clearance (Appendix at 128a), and the District Court held that alternatives need not be evaluated except as part of an Environmental Impact Statement. Appendix at 134a. On the issue of "tipping", the District Court found that there was no "convincing evidence that the Area is in danger of tipping or that construction of public housing on Site 30 would cause tipping." Appendix at 116a.

The Court of Appeals upheld the District Court's decision that an Environmental Impact Statement was not required (Appendix at 61a) and its finding that the project would not cause "tipping". Appendix at 55a. It did not specifically address the issue of whether social and psychological factors, such as "tipping" and community fears, are properly the subject of a NEPA review.

The Court, however, reversed as to the issue of whether alternatives to the proposed must be evaluated. It found that one section of NEPA, 42 U.S.C. §4332(2)(E) (requiring the agency to "study, develop and describe appropriate alternatives to

recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources") mandates an evaluation of alternatives to a proposed project even if an Environmental Impact Statement is not required. Appendix at 57a.

This case was therefore remanded to the District Court to order HUD to evaluate alternatives to the Site 30 proposal.

Subsequent to remand, HUD prepared a new Special Environmental Clearance which incorporated an evaluation of alternatives. The Clearance again concluded that the project would not have a significant impact on the environment and found adverse effects in only two areas: (1) excessive energy consumption as indicated by the architectural drawings and (2) impact on the social fabric and community structure. The first would be correctible by technical measures and has not been at issue in this litigation.

As to impact on the social fabric, HUD found that there would be no significant environmental impact because the proposed project "will not substantially change the income, racial, ethnic or age

distribution of the neighborhood or community." A-54*.

> The small size of the project - 160 units - and the small number of prospective tenants - less than 500 - will have only a minimal effect on the current population distribution. Because priority will be given to [tenants displaced by redevelopment of the Urban Renewal Area] who are now residents within the area on temporary holding sites, with a second priority in occupancy for former residents of [the Urban Renewal Area] who wish to return, the prospective residents of [the Urban Renewal Area] are expected to reflect, on Site 30, the same demographic characteristics.
>
> A-54.

However, HUD in its clearance took note of "a significant and influential segment of the community which

> sincerely opposes a low-rent project on Site 30 not only because of its perceptions that an increase in the area's low-income population will lead to rapid population

*Citations designated as "A-" are to the Joint Appendix filed with the Court of Appeals.

> change (i.e., tipping and white flight) - perceptions which are not directly supported by any facts,analyses or judgments contained in this clearance - but also because those perceptions have been reinforced by the apparent concentration of low-income housing within a restricted portion of [the Area].
>
> A-56; emphasis added.

As to the "apparent concentration of low-income housing within a restricted portion of [the Area]", HUD was speaking of the fact that if the 160-unit project were built on Site 30, a two-block segment along 91st Street, one of the streets bordering Site 30, would contain 837 units of public housing. A-56. HUD noted, however, that there were certain characteristics of this portion of the Area which mitigated this apparent concentration of public housing: good architecture and urban design, open space, "an impressive level of social and familial stability" in the Area's public housing projects and the existence, along the same two-block area, of brownstones and middle income buildings, including two cooperatives. A-35 and A-56.

To comply with the mandate of the

Court of Appeals, HUD evaluated a number of possible alternatives to the Site 30 proposal. These alternatives were weighed in the context of the social environmental impacts of the proposed public housing which, HUD stated, "essentially involve social attitudes common to large numbers of middle and upper-class urban dwellers, particularly in the older central cities of the Northeast" (A-67), even though the "potentially negative perceptual image" of the Site 30 proposal "seems undeserved and distorted in view of the objective facts which emerged in this study." A-67; emphasis added.

The alternatives which were evaluated included alternative locations or sites, alternative designs, disperal of low-income units on two or more sites, rehabilitation of existing buildings, the use of an alternative subsidy program (the Section 8 Housing Assistance Program, 42 U.S.C. §1437f), alternative uses of Site 30, and the so-called "no project" alternative.

In the discussion of alternative sites, two possibilities emerged: Sites 9 and 41. As to Site 9, located five

blocks to the north of Site 30, HUD commented:

> Even though 270 units [of public housing] are planned just north..., the total concentration would be smaller, and the character and width of the major arterial street would lessen the visual and perceived impacts of concentration.
>
> A-69.

Site 41 is located two blocks south. HUD's evaluation was as follows:

> The impacts related to social fabric of the community may not be ameliorated with transfer of the 160-unit public housing project from Site 30 to Site 41. In view of the extensive response to HUD's public notice from residents of W.89th Street and the nature of their comments about low-income and public housing, one might suspect that a proposal to transfer the project to their block might be even more strongly opposed, although it appears to be quite a rational decision, within the context of the Plan and its objectives to facilitate an integrated community.
>
> A-69.

The minimal advantage to be gained appeared to HUD to be outweighed by other considerations:

> The City's most convincing reason in opposition to transfer of the project to an alternative site is the certainty of an additional long delay before construction could commence on any alternative site selected. The added delay is estimated to be at least two years, in the opinion of HUD and city housing professionals familiar with the time required by the various approval processes. ([The New York City Housing Authority] estimates that it could start construction on Site 30 within six months following removal of the injunction.)
>
> A-69.

Consequently, HUD concluded that the City's public housing proposal for Site 30 could proceed. Petitioners (defendants in the District Court) moved for an order dissolving the injunction and dismissing the complaint, which the District Court granted. Appendix at 48a .

On appeal, the Court of Appeals took note of HUD's comments with respect to Sites 9 and 41 but disagreed as to its con-

clusions in assessing the severity of the social environmental impacts and in balancing the various conflicting factors which led HUD to approve the Site 30 proposal. In the first place the Court held:

> The City proposes to build a 17-story apartment building exclusively for low-income tenants in an area already containing a high percentage of low-income housing.* This alone constitutes concentration. Regardless of whether this would cause so-called "tipping," it is not the integration contemplated by NEPA.
>
> Appendix at 7a.

Secondly, the Court held that:

> ...delay is not to be regarded as an overriding factor and that environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight.
>
> Appendix at 9a.

*Lee Goodwin, then New York State Commissioner of Housing and Community Renewal, testified at the trial in 1974 that, because of the high income eligibility limits at Stephen Wise Towers, the public housing project adjacent to Site 30, she did not consider it to be low income housing. Appendix at 119a-120a.

Consequently, the Court of Appeals remanded the case for further evaluation of alternatives and permanently enjoined the construction of high-rise public housing on Site 30.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS, BY ENJOINING PUBLIC HOUSING ON SITE 30, PRE-EMPTED AGENCY DISCRETION, AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE AGENCY, EVEN THOUGH THE AGENCY CONSIDERED ALL FACTORS, INCLUDING SOCIAL FACTORS, IN ITS ENVIRONMENTAL CLEARANCE.

The respondents did not in any way demonstrate that any of the facts in HUD's second Special Environmental Clearance was erroneous or that HUD omitted any factor in its evaluation of the Site 30 proposal or overlooked a possible alternative. Similarly, the Court of Appeals relied exclusively on the Clearance in arriving at its decision to enjoin the project. Rather, the Court of Appeals weighed the various factors involved differently than did HUD and substituted its judgment for that of HUD. The Court of Appeals held (Appendix at 6a) the standard of review to be that of the Administrative Procedure

Act, 5 U.S.C. §706(2)(A) which provides:

> The reviewing court shall --
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...

As to this section of the Administrative Procedure Act, this Court stated in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1970):

> To make this finding the court must consider whether the relevant decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [Citations deleted]. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for the agency.
>
> 401 U.S. at 416.

Moreover, this Court has indicated in Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976) that NEPA does not call for a broader standard of review than that deriving from the Administrative Proce-

dure Act:

> Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. See Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463, 481 (CA2 1971), cert. denied, 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813 (1972). The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." Natural Resources Defense Council v. Morton, 148 U.S. App. D.C.5, 16, 458 F.2d 827, 838 (1972).

Consequently, the Court of Appeals decision in this case conflicts with previous opinions of this Court as to the proper standard of review under NEPA and the Administrative Procedure Act, and this conflict alone justifies the grant of certiorari to review the judgment below.

2. THE COURT OF APPEALS WAS IN ERROR TO MANDATE AN EVALUATION OF ALTERNATIVES TO THE SITE 30 PROPOSAL IN SPITE OF

THE DETERMINATION, UPHELD BY THE COURT OF APPEALS, THAT NO ENVIRONMENTAL IMPACT STATEMENT WAS NECESSARY.

Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), requires a federal agency to file an environmental impact statement (EIS) in connection with any "major federal action significantly affecting the quality of the human environment." The section lists five elements which must be included in an EIS: (1) the environmental impact of the proposed action, (2) adverse environmental effects which cannot be avoided, (3) alternatives, (4) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," and (5) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

With respect to the Site 30 proposal, HUD determined that an EIS need not be prepared because the proposal would not significantly affect the environment. In the first appeal in this action, the Court of Appeals upheld this determination. Nevertheless, it found that HUD must evaluate alternatives pursuant to Section 102(2)(E)

of NEPA, 42 U.S.C. §4332(2)(E)*("study, develop and describe appropriate alternatives to recommended courses of action...").

Unlike the requirement for an EIS, sub-section (E) has no threshold standard and, if applied for the purpose for which the Court of Appeals has construed it, operates in cases of minor federal actions or ones that do not "significantly affect the quality of the human environment..."**

---

*All decisions in this action refer to this sub-section as sub-section (D). An amendment to NEPA subsequent to the first appeal in this action has resulted in a redesignation of the sub-section as (E).

**The Court of Appeals has previously held as to sub-sections (A), (B) and (E) of Section 102(2) [42 U.S.C. and 4332(2) (A), (B) and (E)]:

> While these sections are somewhat opague, they are not expressly limited to "major Federal actions significantly affecting the quality of the human environment." Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972)

The alternatives component of an EIS is probably the most important. It has been described by the Court of Appeals for the Second Circuit as:

> ...the linchpin of the entire impact statement. Without the detailed statement the conclusions and decision of the agency appear to be detached from and unrelated to environmental concerns.
>
> Monroe County Conservation Council, Inc., v. Volpe, 472 F.2d 693, 697-698 (2d Cir. 1972).

Moreover, an adequate consideration of alternatives must follow logically from the first two requirements of an EIS: the environmental impact and adverse effects which cannot be avoided. Alternatives cannot be considered unless the first two subjects are first evaluated. Similarly with an evaluation under sub-section (E): the proper canvassing of alternatives cannot be done in a vacuum, but must follow an assessment of the environmental impact, as HUD did in the Special Clearance at issue in this case.

Thus, by the construction of sub-section (E) which the Court of Appeals has

formulated,* an agency is required to undertake an environmental review that is in substance comparable to an EIS for any minor federal action or an action not "significantly affecting the quality of the human environment."

The importance of this construction of sub-section (E) on the environmental review procedures and practices of all federal agencies can hardly be exaggerated. According to a report of the General Accounting Office entitled "Environmental Assessment Efforts for Proposed Projects Have Been Ineffective," (included in the Joint Appendix at A-627-698), HUD processed between January, 1970 and June 30, 1974 approximately 30,000 project proposals which required environmental clearances. Of this number, HUD found that only 81 were major actions requiring EIS review. Even though the report states that a much larger percentage of these assessments should have received EIS review, it is clear that most clearances are of a type presumably below the threshold standard for an EIS - a "major federal action sig-

*The legislative history does not clarify the meaning and purpose of this provision.

nificantly affecting the quality of the human environment." Yet the Court of Appeal's construction of sub-section (E) requires for thousands of minor clearances an environmental review comparable in scope to that of an EIS.

This case, therefore, presents an important issue of interpretation and construction of the National Environmental Policy Act which should be considered by this Court.

3. SOCIAL AND PSYCHOLOGICAL FACTORS, SUCH AS COMMUNITY OPPOSITION TO PUBLIC HOUSING, ARE NOT ENVIRONMENTAL FACTORS WITHIN THE SCOPE OF THE NATIONAL ENVIRONMENTAL POLICY ACT.

HUD's clearance found no adverse or significant environmental impact in terms of measurable or tangible factors, such as air pollution, traffic congestion, or architectural and design considerations. In terms of many social factors, such as the additional number of children who could be expected to attend the local public schools, or the increased demands on municipal services, no problems were uncovered in the Special Clearance or by the respondents. Furthermore, HUD determined that the proposal "will not substantially

change the income, racial, ethnic or age distribution of the neighborhood or community." A-54.

This case presents an issue purely of "social" or "psychological" impact: the opposition by the respondents and some elements of the community to additional public housing and the fear that the Site 30 proposal will result in "tipping", driving the middle class out of the area -- "perceptions", HUD concluded, "which are not directly supported by any facts, analyses or judgments contained in this clearance." A-56.

The Court of Appeals decision finds that the income level for which the housing project is intended is a relevant environmental consideration. If the project is placed "in an area already containing a high percentage of low-income housing," the result "is not the integration contemplated by NEPA." Appendix at 7a.

The Court of Appeals for the District of Columbia Circuit has stated:

> Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on "environ-

> ment," if the term be stretched to the maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.
>
> Maryland-National Cap. Pk. & Pl. Com'n v. U.S. Postal Service, 487 F.2d 1029, 1037 (D.C. Cir. 1973). Cited with approval as dictum, Nucleus of Chicago Homeowners Ass'n v. Lynn, 524 F.2d 225, 229 (7th Cir. 1975), cert. denied 424 U.S. 967 (1976).

Consequently, this case presents an additional important issue under the National Environmental Policy Act which should be considered by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Dated: July 31, 1979
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